No. 95-5841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL A. WHREN, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS

Steven R. Shapiro
(*Counsel of Record*)
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Susan N. Herman
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7945

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. Both principles are involved in this important Fourth Amendment case. By preserving a zone of personal privacy, the Fourth Amendment protects an important aspect of individual liberty. By limiting police discretion to invade that zone of personal privacy for inappropriate reasons, the Fourth Amendment promotes equal treatment under the law. Pretextual searches, on the other hand, trivialize the interest in personal privacy and encourage discriminatory law enforcement. The proper resolution of this case is, therefore, a matter of concern to the ACLU and its members around the country.

STATEMENT OF THE CASE

On June 10, 1993, Michael Whren and James Brown, two young black men, were driving a Nissan Pathfinder with temporary tags through the streets of Southeast Washington, D.C. Their car was stopped by plainclothes officers from a vice unit who were patrolling the area looking for illegal drug activity. The defendants were arrested after the police discovered crack cocaine in the car.

The police contend that they stopped the car for alleged traffic violations, although it is undisputed that the policy of the D.C. Police Department is that officers "who are not in uniform or are in unmarked vehicles may take [traffic] enforcement action only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

others,"[2] and that no such threat existed in this case. Defendants contend that the alleged traffic violations were a mere pretext that allowed plainclothes vice officers to stop the car for a drug search without probable cause or reasonable suspicion.

In denying defendants' motion to suppress, both the district court and the court of appeals acknowledged that the police lacked any constitutionally adequate suspicion to stop the car and search for drugs. And neither court quarreled with defendants' assertion that the alleged traffic violations were only a pretext to conduct a drug search for which there was no other colorable constitutional basis. Both courts nevertheless concluded that the issue of pretext was constitutionally irrelevant so long as there was reason to believe that defendants were actually committing a traffic violation.

The court of appeals in this case recognized that the standard for reviewing pretextual searches has divided the circuits and chose to embrace a standard under which the only relevant inquiry is whether the defendants "could have" been stopped for violating the traffic laws. Since the answer to that question in this case is obviously yes, the court ruled that there had been no Fourth Amendment violation. In reaching this determination, the D.C. Circuit specifically rejected the test adopted by two other circuits, which asks whether a reasonable police officer "would have" conducted the search under similar circumstances. In addition, the D.C. Circuit interpreted the "could have" test in the broadest possible fashion. Thus, the fact that these officers could *not* have stopped defendants' car for a mere traffic violation under existing regulations was deemed irrelevant so long as some officer on the D.C. police force could have done so.

---

[2] Washington Metropolitan Police Department General Order 303.1(I)(A)(2)(a)(4), issued April 30, 1992 (emphasis in original).

SUMMARY OF ARGUMENT

This case raises a fundamental Fourth Amendment issue in a common factual setting. Whether intentionally or not, virtually everyone violates the traffic laws at one point or another. Inevitably, the police exercise broad discretion in deciding whom to stop. According to the court below, that discretion cannot be questioned even if the police act on the one basis that the Fourth Amendment most clearly forbids -- namely, the inarticulate and unsubstantiated hunch that the person stopped may be violating some other criminal law.

This result cannot be reconciled with either the underlying principles of the Fourth Amendment or this Court's previous decisions. In particular, the Court has never adopted such a cramped view of the Fourth Amendment's reasonableness requirement. As this Court has recognized, reasonableness can only be judged in context. In circumstances where there is no reason to fear the abuse of police discretion, such as drunk driving roadblocks, the police may be allowed to stop cars on the highway even in the absence of individualized suspicion. *See Michigan v. Sitz*, 496 U.S. 444 (1990). But the corollary proposition is also true. The concerns of the Fourth Amendment are not automatically satisfied merely because there is a basis to stop a person or car. *See Tennessee v. Garner*, 471 U.S. 1 (1985).

For example, if the police singled out cars for traffic stops on the basis of race or the political views expressed on a bumper sticker, important constitutional norms would be violated. Those norms, moreover, are not limited to the Equal Protection Clause and the First Amendment. The Fourth Amendment also embodies an important equality principle. Indeed, one of the basic purposes of the Fourth Amendment is to reduce the risk of arbitrary or discriminatory police behavior, and thereby insure equal treatment under the law. *See Marshall v. Barlow's Inc.*, 436 U.S. 307

(1978); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

It is not surprising, therefore, that this Court's opinions repeatedly suggest, albeit in *dicta*, that pretextual stops violate the Fourth Amendment. That proposition, of course, is consistent with a broader body of constitutional law, which holds that government violates the Constitution when it acts for the wrong reason even though it has broad discretion to act for almost any reason at all. Thus, a public university may refuse to renew the contract of a non-tenured faculty member for a multitude of reasons without being subject to constitutional scrutiny. But it may not do so to punish the faculty member for the expression of his or her constitutionally protected views. *See Perry v. Sindermann*, 408 U.S. 593 (1972). In another analogue that is perhaps closer to the facts of this case because it first arose in a criminal context, a prosecutor may use peremptory challenges to disqualify prospective jurors for many reasons, including entirely frivolous ones. But this Court has made clear that a prosecutor may not act on the basis of a juror's race or gender. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama*, 511 U.S. __, 114 S.Ct. 1419 (1994).

A search that would never have taken place if the police were not looking for an excuse to circumvent the requirements of the Fourth Amendment is a search for the wrong reasons and should be condemned. Among other things, it is too easy for the police either to invoke or invent a traffic violation after the fact to justify a search that was unlawful at its inception. The more difficult question is not whether to prohibit pretextual searches but how to determine whether a pretextual search has occurred.

On that issue, this is an easy case. The D.C. Police Department has an explicit regulation that bars plainclothes officers in unmarked cars from making traffic stops. There is

not even a pretense, therefore, that the officers in this case were engaged in routine traffic enforcement. The traffic stop was simply a means to an end, and the end was a search for illegal drugs that was plainly unjustified based on the facts that the police knew at the time.

Most cases, unfortunately, will not be so easy because there will not always be written regulations. The existence of a written regulation, however, is only one form of objective proof that the police were acting for pretextual reasons. It is not the only form. Indeed, the general rule when analyzing the reasonableness of a police stop is to ask whether the stop would have been made by a reasonable officer in similar circumstances. *Terry v. Ohio*, 392 U.S. 1 (1968). That is the test now applied by the Ninth and Eleventh Circuits and it is an appropriate test in our view, as well. At the very least, it should shift the burden to the police, as the burden shifts to the prosecutor under *Batson*, to establish a valid, non-pretextual reason for the search.

The court below rejected the "would have" test in favor of a test that merely asks whether any police officer "could have" stopped the defendants under equivalent facts. The issue of pretext, however, only arises when the defendants "could have" been stopped for other reasons. Thus, the "could have" test applied by the D.C. Circuit in this case is not really a test for pretext at all. It is, instead, a mechanism for rejecting each and every pretext claim.

Finally, there may be some cases where even the "would have" test may be insufficient to ferret out all pretextual searches. For example, a reasonable traffic officer will, in most cases, stop speeding motorists who go through red lights. Yet, a particular officer may still stop a particular motorist for constitutionally impermissible reasons. Such subjective bad faith is notoriously difficult to prove. Nothing in this Court's Fourth Amendment jurisprudence, however, requires a trial judge to ignore evidence of unconstitu-

tional motive when it comes to light. To the contrary, this Court's precedents make clear that use of the exclusionary rule makes perfect sense under these circumstances precisely because it removes the incentive for unconstitutional police behavior.

ARGUMENT

I. THE FOURTH AMENDMENT PROHIBITS OFFICERS FROM USING PRETEXTUAL REASONS TO MAKE A STOP, CONDUCT A SEARCH, OR EFFECT A SEIZURE

The Fourth Amendment prohibits "unreasonable searches and seizures." Thus, a "police officer must be able to point to specific and articulable facts" to justify an intrusion. *Terry v. Ohio*, 392 U.S. at 21. A judge must then decide whether a search or seizure was reasonable based on the circumstances. *Id.* To do less "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Id.* at 22; *accord Delaware v. Prouse*, 440 U.S. 648, 661 (1979)(extending *Terry* rationale to vehicle stops).

In a pretext case, the "inarticulate hunches" denounced in *Terry* and *Prouse* become the operative reason for an investigative stop. Time and again, therefore, this Court has carefully distinguished lawful searches from pretextual searches in a series of opinions spanning more than six decades. Many of those opinions deal with inventory searches. For example, in *Florida v. Wells*, 495 U.S. 1, 4 (1990), Chief Justice Rehnquist stressed that "[t]he policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence

of crime")(citations omitted). In *Colorado v. Bertine*, 479 U.S. 367, 376 (1987), Chief Justice Rehnquist again noted the absence of any evidence "that the police chose to impound Bertine's van in order to investigate suspected criminal activity." *See also South Dakota v. Opperman*, 428 U.S. 364, 376 (1976)(upholding inventory search of impounded car and noting that "there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive")(footnote omitted).

Concern about pretext also pervades this Court's other administrative search cases. In *New York v. Burger*, 482 U.S. 691, 716 n.27 (1987), the Court upheld an administrative search of Burger's automobile junkyard only after noting that there was "no reason to believe that the instant inspection was a 'pretext' for obtaining evidence of respondent's violation of the penal laws." In *Abel v. United States*, 362 U.S. 217, 226 (1960), Justice Frankfurter used even stronger language when he wrote:

> [D]eliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States.

Similar statements appear throughout this Court's Fourth Amendment jurisprudence. *Texas v. Brown*, 460 U.S. 730, 743 (1983), is illustrative. In *Brown*, the Court upheld the seizure of narcotics discovered by the police in plain view at a routine driver license checkpoint. Writing for the plurality, then-Justice Rehnquist was careful to note that there was "no suggestion that the roadblock was a pre-

text whereby evidence of narcotics violation might be uncovered." *See also Steagald v. United States*, 451 U.S. 204, 215 (1981)(ruling arrest warrant does not legitimize search of house of person not named in warrant and stressing possibility for abuse if "an arrest warrant may serve as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place"); *Colorado v. Bannister*, 449 U.S. 1, 4 n.4 (1980)(*per curiam*)(denying motion to suppress after discussing lack of any "evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants"); *Jones v. United States*, 357 U.S. 493, 500 (1958)(suppressing evidence that government maintained had been found in search incident to arrest and refusing to consider argument that probable cause existed for arrest because "testimony of the federal officers makes clear beyond dispute that their purpose in entering was to search . . . not to arrest"); *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932)(providing that otherwise lawful "arrest may not be used as a pretext to search for evidence").

The cumulative wisdom of all of these cases is that pretextual searches cannot be regarded as reasonable searches under the Fourth Amendment. As this Court has repeatedly recognized, the "basic purpose" of the Fourth Amendment is "to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

The Court's longstanding condemnation of pretextual searches is neither surprising nor unusual. Indeed, it would be surprising if pretextual searches were deemed tolerable under the Fourth Amendment given the fundamental constitutional principle that the government's broad discretion to act does not include the right to act for constitutionally impermissible reasons. As this Court has broadly stated the

proposition, "even though the government may deny [a] benefit for any number of reasons, there are some reasons upon which the government may not rely." *Perry v. Sindermann*, 408 U.S. at 597. Thus, a government employee cannot be dismissed because the government disagrees with his constitutionally protected speech. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). Furthermore, if a government employee is fired for two reasons, one constitutional and one not, the government must prove that it would have taken the same action even in the absence of any unconstitutional motive. *Mount Healthy v. Doyle*, 429 U.S. 274 (1977).[3] Similarly, a prosecutor's right to exercise peremptory challenges for a broad array of reasons does not include the right to exclude prospective jurors on the basis of race, *Batson v. Kentucky*, 476 U.S. 79, or gender, *J.E.B. v. Alabama*, 114 S.Ct. 1419.

Beyond these general principles, the Court's condemnation of pretextual searches also reflects values intrinsic to the Fourth Amendment. As this Court has often noted, issues of reasonableness turn upon context. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). In circumstances where there is little reason to fear the abuse of police discretion, the police may be allowed to stop cars on the highway even in the absence of individualized suspicion. *Michigan v. Sitz*, 496 U.S. 444. But even individualized suspicion may not suffice when there is reason to believe that the police are using traffic stops to circumvent the requirements of the Fourth Amendment. A contrary rule would effectively authorize what the Fourth Amendment most clearly condemns -- invasions of privacy based on unsubstantiated hunches that criminal activity may be taking place.

---

[3] *See also Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)(applying the *Mount Healthy* standard to mixed-motive cases under Title VII).

It is true, of course, that a pretextual stop has the patina of legality because it depends on the existence of a plausible claim that some law has been violated, albeit not the law that the police are seriously interested in investigating. However, that is merely the definition of a pretextual stop, not its justification. This Court long ago rejected the notion that the concerns of the Fourth Amendment are automatically satisfied simply because there is a basis to stop a person or car, *e.g.*, *Tennessee v. Garner*, 471 U.S. 1 (lawful stop does not justify excessive force in achieving stop), or to execute a search warrant, *e.g.*, *Wilson v. Arkansas*, 514 U.S. __, 115 S.Ct. 1914 (1995)(common law knock-and-announce rule is part of the Fourth Amendment's reasonableness inquiry).

Surely, there can be no serious quarrel with the proposition that the Constitution forbids the police from stopping motorists on the basis of race even if each of the motorists stopped has also committed a traffic violation. Such police behavior would undoubtedly violate the Equal Protection Clause. *See Delaware v. Prouse*, 440 U.S. at 667 (Rehnquist, J., dissenting). But it violates important Fourth Amendment principles, as well. *See United States v. Brignoni-Ponce*, 422 U.S. at 885-87.[4]

---

[4] There are several very practical problems with relying exclusively on the Equal Protection Clause to remedy a pattern of racial discrimination in police stops. First, the absence of a pattern and practice of racial discrimination does not prove that an individual motorist was not stopped for discriminatory reasons. Second, individual defendants face well-documented and often insurmountable problems in trying to establish such a pattern and practice, at least in part because of the difficulty in obtaining relevant police records. Indeed, it was for precisely this reason that the Court in *Batson* ultimately abandoned the pattern-and-practice approach of *Swain v. Alabama*, 380 U.S. 202 (1965), in redressing the problem of discriminatory jury selection. Finally, even proof of a pattern and practice of racial discrimination may be insufficient to estab-

(continued...)

This Court has stressed that determinations of reasonableness under the Fourth Amendment turn on society's judgment about what is legitimate. *See Vernonia School District v. Acton*, 515 U.S. __, __, 115 S.Ct. 2386, 2390 (1995). If so, we are well past the time when our society is prepared to describe race-based decisions by government officials as a "legitimate" basis for the exercise of police authority. This is especially so "given the pervasiveness of such minor offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone." 1 LaFave, SEARCH AND SEIZURE §1.4(e)4 at 123 (3d ed. 1996).

On its face, of course, this case does not involve a claim of racial discrimination. However, this case cannot be resolved in a vacuum. A rule condoning pretextual searches is a rule that invites discriminatory enforcement. As Judge Newman has observed,

> "[t]he risk inherent in such a practice is that some police officers will use the pretext of traffic violations or other minor infractions to harass members of groups identified by facts that are totally impermissible as a basis for law enforcement activity -- factors such as race or ethnic origin, or simply appearances that some police officers do not like, such as young men with long hair, jewelry, and flashy clothing."

United States v. Scopo, 19 F.3d 777, 785-786 (2d Cir.) (Newman J., concurring), *cert. denied*, __ U.S. __, 115 S. Ct. 207 (1994). *See also* Rudovsky, "The Impact of the War on Drugs on Procedural Fairness and Racial Equality,"

---

[4] (...continued)
lish discrimination in a particular case. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279 (1987).

1994 U.Chi.L.Rev. 237, 250 (discussing evidence of racial disparity in traffic stops).

In short, pretextual searches effectively undermine the critical safeguards against arbitrary and discriminatory law enforcement that the Fourth Amendment was designed to erect. The serious question in this case, therefore, is not whether pretextual searches violate the Fourth Amendment -- that question has already been answered in numerous opinions by this Court -- but rather what standard should be applied in determining whether a pretextual search has occurred.

II. THE STANDARD FOR DETERMINING PRETEXT ADOPTED BY THE COURT BELOW IS INADEQUATE TO PRESERVE CORE FOURTH AMENDMENT VALUES

The court below framed the issue in this case as a dispute between those who advocate a subjective test for determining pretext and those who favor an objective standard. It then concluded that an objective standard was constitutionally required and that the only suitable objective standard is one that asks whether these defendants "could have" been stopped by any police officer under the facts of this case. Finally, it applied the "could have" test to uphold the stop of defendants' car despite the fact that the police officers who ordered the stop were barred by their department's own internal regulations from traffic enforcement.[5]

---

[5] The willingness of the D.C. Circuit to ignore the police department's own regulations is revealing. *Compare Colorado v. Bertine*, 479 U.S. at 375-76 (disregard of standard procedures is relevant in assessing reasonableness under the Fourth Amendment). In articulating its rule, the court below stated that "a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the

(continued...)

The approach followed by the court below is fatally flawed for several reasons. Most basically, the "could have" test applied by the D.C. Circuit is not a test for determining pretext but for excusing it. If the police lack even a facially plausible reason for conducting a search, there is no need to claim pretext. The search is unconstitutional because probable cause is lacking. The issue of pretext only arises when there is a facially plausible reason to conduct the search but there is also reason to believe that the police are using the search to circumvent important Fourth Amendment safeguards. Typically, as in this case, that means that the police are relying on a minor traffic violation to look for evidence of a more serious crime that they lack sufficient cause to investigate. If the only question is whether some police officer "could have" stopped the defendants for violating the traffic laws, every pretextual search will be sustained. In reality, therefore, the standard proposed by the court below can more fairly be described as a non-test.

A. The Stop And Search In This Case Should Have Been Invalidated Under Any Plausible Fourth Amendment Standard

On these facts, this should have been an easy case. It is undisputed that the defendants were stopped by plainclothes officers in an unmarked car who were assigned to search for illegal drug activity. It is also undisputed that these officers

---

[5] (...continued)
suspected traffic violations." *United States v. Whren*, 53 F.3d 371, 375 (D.C.Cir. 1995)(emphasis in original). Because of the police regulations, however, an officer "in the same circumstances" as the officers in this case could not have stopped defendants' car. Thus, it is clear that the D.C. Circuit meant to give its rule the broadest possible interpretation and to sustain any search that at least some police officer on the force could have conducted.

were prohibited by their own regulations from enforcing the traffic laws. Whether one believes that is a wise regulation or not, the existence of the regulation removes any doubt about what was going on in this case. The police had a hunch that the defendants were engaged in illegal drug activity but no probable cause or reasonable suspicion. They followed defendants' car until they observed a minor traffic violation and then used the excuse of the traffic violation to stop the car and look for drugs.[6]

This is a classic definition of a pretextual search. It is no different than the "deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case." *Abel v. United States*, 362 U.S. at 226. As Justice Frankfurter appropriately noted, such a deliberate end run around the Constitution "must meet stern resistance by the courts." *Id.* The fact that this behavior was condoned by the D.C. Circuit is sufficient to show that the "could have" test it proposed is both functionally meaningless and doctrinally unsound.

It is also a test that this Court implicitly rejected in *Colorado v. Bannister*, 449 U.S. 1. In *Bannister*, the Court upheld a traffic stop that led to an arrest for stealing, noting the lack of any "evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants." *Id.* at 4 n.4. This reservation would not have been necessary if the "could have" test applied since there, as here, it was clear that the traffic violation gave the police ample cause to stop the defendants' vehicle.

[6] By the same token, had the police conducted themselves in accordance with the regulation a court could presume, subject to rebuttal, that the search was not pretextual. *See* n.10, *infra*.

B. In The Absence Of A Controlling Regulation, The Appropriate Question Is How A Reasonable Officer Would Have Acted Under Similar Circumstances

Not every case will be as easy as this one because not every case will involve police officers who so clearly violated a departmental regulation that prohibited them from engaging in the search they now seek to justify. But the existence of a regulation of this sort is only one form of objective proof. In the absence of such a regulation, it is appropriate to ask the question that this Court asked in *Terry*: "[W]ould the facts available to the officer at the moment of the seizure 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" 392 U.S. at 21-22 (citations omitted). In essence, this test asks what a reasonable officer would have done in the circumstances presented. Or, as the Ninth and Eleventh Circuits have framed the issue, a stop is valid only if "under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose." *See United States v. Valdez*, 931 F.2d 1448, 1450 (9th Cir. 1991); *United States v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986); *United States v. Cannon*, 29 F.3d 472, 475-76 (9th Cir. 1994).[7] Applied to the facts of this case, for example, the issue is whether a reasonable narcotics officers, bound by his department's own regulations, would have stopped defendants' car for a minor traffic violation were it not for the hope of obtaining evidence of drugs.[8]

[7] At the time of the decision below, the Tenth Circuit also embraced the "would have" test, *see United States v. Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988). It has sinced adopted the "could have" test instead. *United States v. Botero-Ospina*, 71 F.3d 783, 786-87 (9th Cir. 1995).

[8] *See also Murray v. United States*, 487 U.S. 533 (1988)(remanding for (continued...)

The court below offered two reasons for rejecting the "would have" test, neither of which has validity. First, the court mischaracterized the "would have" test as requiring an inquiry into the "officer's subjective state of mind." 53 F.3d at 375.[9] That characterization is manifestly incorrect. Here, as in *Terry*, the reference point is what a reasonable officer would have done under similar circumstances. Not only is that an objective inquiry, it is the sort of inquiry that courts undertake on a daily basis. The court need not look into the officer's mind; the court need only look at the circumstances confronting the officer and determine whether the response was an objectively reasonable one.

The second reason offered by the D.C. Circuit for rejecting the "would have" test was the belief that it would not "provide[] a principled limitation on abuse of power." 53 F.3d at 376. As demonstrated above, however, it is the D.C. Circuit's "could have" test that does not work unless the definition of working is a test that sustains every pretextual search. There is no more reason to question the utility of a reasonableness test in this context than in any of the other contexts where it is routinely applied, including the evaluation of qualified immunity defenses in affirmative Fourth Amendment challenges. *See, e.g., Anderson v. Creighton*, 483 U.S. 635 (1987).

If a defendant succeeds in demonstrating that a reasonable officer would have acted differently under the same circumstances -- a showing that will presumably be difficult to

---

[8] (...continued)
further hearings to determine whether police officers, who illegally entered a warehouse without a warrant, "would have" sought a search warrant anyway and thus obtained the marijuana they discovered during the illegal search under the independent source doctrine).

[9] *See also United States v. Scopo*, 19 F.3d at 782.

make in most cases -- *Batson* provides an appropriate model of how to proceed. Specifically, the burden should shift to the police to establish a valid, non-pretextual reason for the search. If the police meet this burden, the evidence should be admissible. If they do not, it should be excluded.[10]

C. Courts Need Not And Should Not Ignore Clear Evidence That A Police Officer Acted With Subjective Bad Faith To Evade The Fourth Amendment

In some cases, the "would have" test alone will be insufficient to fulfill the purposes of the Fourth Amendment. *See* Burkoff, "Bad Faith Searches," 57 N.Y.U. L.Rev. 70, 81 (1982). Objective circumstances examined without reference to motive can often be misleading. *Id.* at 120. Any objective test will undoubtedly miss some improper actions that appear objectively reasonable. For instance, an officer's statement that "I stopped the car because the driver was black" should be admissible to show unreasonableness even if the car was speeding. If the Court rules that an inquiry

---

[10] An additional benefit of this test is that it may encourage police departments to promulgate general guidelines for its officers. If an officer can show that his actions were taken pursuant to a standardized policy, then those actions are likely to be upheld unless the policy is itself unreasonable. *See United States v. Robinson*, 414 U.S. 218, 221 n.1 (1973).

As this Court noted when commenting on the inventory search practices of the Boulder Police Department:

> Nothing . . . prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.

Colorado v. Bertine, 479 U.S. at 375.

into motive is never relevant in pretext cases, officers could admit that they stopped someone because he was black without affecting a criminal prosecution. Such a holding would ignore the anti-discrimination principle of the Fourth Amendment. *See United States v. Brignoni-Ponce,* 422 U.S. at 885-87.

The whole point of Fourth Amendment doctrine has been to send messages to officers about their conduct in order to protect constitutional values. It would be inconsistent to ignore the real reason officers act and, instead, ask only whether there might be an acceptable reason that could have justified the officers' behavior. The latter approach encourages pretextual claims; it does not encourage compliance with the requirements of the Fourth Amendment.

In suggesting that an inquiry into motive is appropriate, we do not mean to say that the mere thought that someone might have drugs is enough to invalidate actions taken to enforce traffic laws. The relevant question is whether the operative reason for the stop was invalid. It is the defendants' burden to make that showing and the burden is a heavy one. But, if that showing can be made, it would be an odd notion of law that asked the court to ignore it.

None of this Court's prior decisions compel such a perverse result. Two cases are most frequently cited for the proposition that an officer's subjective motivation is irrelevant to Fourth Amendment analysis. In fact, neither case stands for such an extreme proposition. The primary case, on which the other one relies, is *Scott v. United States*, 436 U.S. 128 (1978). The issue in *Scott* was whether federal agents violated the Fourth Amendment during a court-ordered wiretap. In addressing that question, the Court ruled that the inquiry should focus on whether the agents' actions were objectively justified. *Id.* at 137-38.

Unlike this case, however, *Scott* was not a case about

pretext. The question in *Scott* was whether the agents made reasonable efforts at minimizing the calls they intercepted. The holding of *Scott* is that the answer to that question should not depend on the agents' subjective motivation.[11] In a pretext situation, by contrast, the question is precisely whether officers had an improper purpose.[12] Whether this issue can be resolved without reference to subjective motivation is a question the Court did not answer in *Scott*.[13]

---

[11] Significantly, the agents in *Scott* did not exceed minimization constraints even though they apparently intended to do so. *See* Burkoff, p.17, *supra*, at 83-84. *Scott*, therefore, "merely held that improper intent that is not acted upon does not render unconstitutional an otherwise constitutional search." Burkoff, *id.*

[12] Indeed, *Scott* expressly left open the possibility that in some situations motive can play a role in a suppression inquiry. 436 U.S. at 139 n.13. The Court provided two "limited" examples. The first example involved the applicability of the exclusionary rule in non-criminal settings, where it becomes relevant to ask whether the exclusion of evidence will effectively deter unlawful conduct. The second example involved the use of motive as a factor in assessing the credibility of officers who testify about the facts available to them at the time of the search. *Id.* Although neither of these examples touches on pretext, nothing in *Scott* forecloses the use of subjective evidence in evaluating pretext.

[13] The question was also not addressed in *Terry*, which provided for an objective standard in ordinary reasonable suspicion cases. 392 U.S. at 21-22. As *Terry* makes clear, this standard was a response to the suggestion that subjective good faith was enough to validate a stop. *Id.* at 22. The pretext question of subjective bad faith was irrelevant in *Terry*. Nor was the question addressed in *Maryland v. Macon*, 472 U.S. 463, 471-72 (1985). There, the Court, citing *Scott* for the proposition that a determination of whether the Fourth Amendment has been violated depends on an objective assessment of the officer's actions, held that a sale does not become a seizure merely because an officer kept the money. *Id.* at 471-72. Like *Scott*, *Terry* and *Macon* did not arise in the pretext context, and are similarly limited.

The second case that has been said to preclude inquiry into motive in pretext cases is *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983). *Villamonte-Marquez* cites to *Scott* in a footnote dismissing the contention that, because customs officers were following a drug tip, they could not rely on a statute authorizing random boarding for document checks.[14] To the extent *Villamonte-Marquez* relies on *Scott* in a pretext context, that reliance is misplaced. Additionally, the footnote in *Villamonte-Marquez* does not state that there was evidence that the boarding would not have occurred but for the drug hunch. Instead, the evidence apparently only showed that drugs were an issue in the minds of officers. This is not surprising given that customs officers are supposed to stop drug importation. If *Villamonte-Marquez* forecloses anything in the pretext context, it stands for the proposition that it is not enough that there might be another issue on the minds of officers. We do not disagree; as discussed above, the evidence must show that the operative reason for action was improper.

[14] The footnote states that respondents "contend in the alternative that because the customs officers were accompanied by a Louisiana state policeman, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana, they may not rely on the statute authorizing boarding for inspection of the vessel's documentation." The footnote then declares that such a "line of reasoning was rejected in a similar situation in *Scott*."

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

Steven R. Shapiro
(*Counsel of Record*)
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Susan N. Herman
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7945

Dated: February 16, 1996